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IN THE COURT OF APPEALS OF INDIANA

KEVIN FRY and SUSAN FRY,	)	
	)	
Appellants-Petitioners,	)	
	)	
vs.	)	No. 43A03-0603-CV-122
	)	
REX HAGEN Individually and d/b/a HAGEN HOLDING, LTD and ANGIE ATTEBERRY,	)	
	)	
Appellees-Respondents.	)	

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0309-CT-00620

SEPTEMBER 8, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Plaintiffs-appellants Kevin and Susan Fry appeal the trial court's grant of summary judgment in favor of defendants-appellees Rex Hagen, individually, and d/b/a Hagen Holding, Ltd. We affirm.

We address one issue: whether the trial court erred in granting summary judgment in favor of Hagen and Hagen Holding.

In May 2001, Hagen Holding and Angie Atteberry entered into a lease agreement that granted Atteberry the use and occupation of a farmhouse in Kosciusko County. One month later, Atteberry's boyfriend, Wayne Miller, invited several friends to the property for a bonfire. While waiting for other guests to arrive, Joel Fry, Mike Roe, and Chris Myers entered a corn crib, or small barn, located fifty yards from the farmhouse. Fry, Roe, and Myers all climbed fifteen to twenty feet of wooden slats to a loft inside the barn. Twenty-year-old Fry grabbed a hanging rope, took a running leap from the loft, swung across the barn, and returned safely to the loft. During Fry's second swing on the rope, the rope broke. Fry fell approximately twenty feet to the barn floor where he struck his head and shoulders on a seam between two concrete slabs. Fry never regained consciousness and died three days later.

In 2003, Fry's parents, Kevin and Susan Fry, filed a negligence action against Hagen Holding, Hagen, and Atteberry. Hagen Holding and Hagen filed a summary judgment motion, which the trial court granted. The Frys appeal the trial court's grant of the motion.[1]

[1] Atteberry is not a party to this appeal.

The standard of review for the grant of a summary judgment motion is well settled. *Poyser v. Peerless*, 775 N.E.2d 1101, 1105 (Ind. Ct. App. 2002). Summary judgment is appropriate if the designated evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). Relying on specifically designated evidence, the moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Poyser*, 775 N.E.2d at 1105. If the moving party meets these two requirements, the burden shifts to the non-movant to set forth specifically designated facts showing that there is a genuine issue for trial. *Id.* If a nonmovant fails to meet this burden, summary judgment in favor of the movant is appropriate. *Maynard v. 84 Lumber Co.*, 657 N.E.2d 406, 408 (Ind. Ct. App. 1995), *trans. denied*.

On appeal, we are bound by the same standard as the trial court and we consider only those matters that were designated at the summary judgment stage. *Poyser*, 775 N.E.2d at 1105. We liberally construe all designated evidentiary material in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact for trial. *Id.* The party that lost in the trial court has the burden to persuade the appellate court that the trial court erred. *Id.* A grant of summary judgment may be affirmed upon any theory supported by the designated materials. *Id.*

A landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant and other persons lawfully upon the leased property. *Flott v. Cates*, 528 N.E.2d 847, 848 (Ind. Ct. App. 1988).

However, a landlord owes a duty of reasonable care to maintain common areas on the property in a reasonably fit and safe condition. *Ransburg v. Richards*, 770 N.E.2d 393, 402 (Ind. Ct. App. 2002), *trans. denied*. The duty to maintain common areas extends to members of the tenant's family, his employees, his invitees, his guests, and others on the land in the right of the tenant because their presence is a part of the normal use of the premises for which the lessor holds them open. *Slusher v. State*, 437 N.E.2d 97, 99 (Ind. Ct. App. 1982) (citing Prosser, Law of Torts (4th Ed. 1971) § 63 at 406).

Common areas are those areas that tenants are permitted to use but do not occupy. *Frost v. Phenix*, 539 N.E.2d 45, 47 (Ind. Ct. App. 1989). They are areas over which the landlord retains control. *Flott*, 528 N.E.2d at 848. Common areas generally include areas such as parking lots, sidewalks, elevators, hallways, foyers, and stairways that are all reasonably necessary for the use and enjoyment of the leased property. *See e.g.*, *Aberdeen Apartments v. Cary Campbell Realty Alliance, Inc.*, 820 N.E.2d 158 (Ind. Ct. App. 2005), *trans. denied*; *Slusher*, 437 N.E.2d at 97; *Tippecanoe Loan and Trust Company v. Jester*, 180 Ind. 357, 101 N.E. 915 (1913); *LaPlante v. LaZear*, 31 Ind.App. 433, 68 N.E. 312 (1903).

Here, in their complaint, the Frys claimed that the corn crib was a common area, and that Hagen and Hagen Holding breached their duty of reasonable care to maintain it in a reasonably fit and safe condition. In their summary judgment motion, Hagen and Hagen Holding designated evidence that the corn crib was not a common area. Specifically, Hagen and Hagen Holding designated Atteberry's responses to the Frys' interrogatories wherein Atteberry averred that she had neither control nor possession of

the corn crib and did not use it. Hagen and Hagen Holding also designated Atteberry's deposition wherein she testified that no one had ever told her that she was permitted to either enter or use the corn crib. Hagen and Hagen Holding further designated Mark Hagen's affidavit wherein he testified that the vacant corn crib, which was used to store a friend's boat, remained in the Hagen Holding's possession and control.

This designated evidence, which reveals that both the landlord and the tenant understood that the corn crib remained in Hagen Holding's possession and control and that Atteberry was not permitted to use it, shifted the burden to the Frys to set forth evidence showing a genuine issue of fact for trial. The Frys designated evidence that 1) Atteberry's boyfriend stored some of his "stuff" in the corn crib because that is where he wanted to put it, and 2) a farmer who leased the tillable land on the farm stored equipment in the corn crib. *Appellant's Appendix* at 65. This evidence does not show that swinging on a rope in the corn crib was part of the normal use for which Atteberry held the premises open or that the corn crib was reasonably necessary to the use and enjoyment of the leased property. The Frys have failed to create a genuine issue of fact regarding whether the corn crib was a common area, and therefore failed to meet their burden.

Having determined that the corn crib was not a common area, we must now determine the duty that landowner Hagen Holding owed to Fry. The law is well established that a person entering upon the land of another comes upon the land as an invitee, a licensee, or a trespasser. *Rhoades v. Heritage Investments, LLC*, 839 N.E.2d 788, 791 (In. Ct. App. 2005), *trans. denied*. An invitee is invited to enter or to remain on

another's land. *Id.* at 792. Licensees and trespassers are those who enter the land of another for their own convenience, curiosity, or entertainment and take the premises as they find them. *Id.* at 791. Licensees, unlike trespassers, have a privilege to enter or remain on the land by virtue of the landowner's permission or sufferance. *Id.*

A landowner owes the highest duty of care to an invitee. *Taylor v. Duke,* 713 N.E.2d 877, 881 (Ind. Ct. App. 1999). That duty is to exercise reasonable care for the invitee's protection while he is on the premises. *Id.* Landowners owe a licensee the duty to refrain from willfully or wantonly injuring him or acting in a manner to increase his peril. *Id.* Finally, the duty owed to a trespasser is the merely the duty to refrain from wantonly or willfully injuring him. *Id.*

A person's status, along with the duty owed, is a question of law. *Rhoades*, 839 N.E.2d at 791. Here, Fry entered the corn crib for his own curiosity and entertainment. Further, he entered the property without Hagen Holding's permission or sufferance. Fry was therefore a trespasser in the corn crib to whom Hagen Holding owed a duty to refrain from willfully or wantonly injuring. *See e.g., Taylor*, 713 N.E.2d at 881.

Wanton and willful conduct consists of either: 1) an intentional act done with reckless disregard of the natural and probable consequences of injury to a known person under the circumstances known to the actor at the time; or 2) an omission or failure to act when the actor has actual knowledge of the natural and probable consequences of injury and has opportunity to avoid that risk. *Id.* at 882. This conduct is comprised of two elements: 1) the defendant's knowledge of an impending danger or consciousness of

misconduct calculated to result in probable injury; and 2) the defendant's conduct must have exhibited an indifference to the consequences of the act. *Id.*

Willful or wanton misconduct is so grossly deviant from everyday standards that the trespasser cannot be expected to anticipate it. *Id.* Willfullness cannot exist without purpose or design. *Id.* Known probability of injury is the key to the consideration of the wantonness. *Id.*

Here, the Frys have failed to raise a genuine issue of fact that Hagen and Hagen Holding acted willfully or wantonly. Specifically, they have designated no evidence that Hagen and Hagen Holding had knowledge of an impending danger or consciousness of misconduct calculated to result in probable injury or that their conduct exhibited an indifference to the consequences of the act. Further, the Frys have failed to raise a genuine issue that Hagen Holding's conduct was so grossly deviant from everyday standards that Fry could not have been expected to anticipate it. The trial court did not err in granting summary judgment to Hagen and Hagen Holding in the Frys' negligence action.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.